

**A Imelda Nasreen bt Nasruddin @ Balchin v Norizatul Amira bt
Kamsan**

B HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL
NO WA-12BCY-2-06 OF 2022
ROZ MAWAR ROZAIN JC
7 NOVEMBER 2023

C *Tort — Defamation — Defamatory statements — Respondent was a witness in
defamation suit — Appellant posted comment on Facebook that respondent had
retracted her earlier position given prior to trial of defamation suit — Respondent
sued appellant for defamation — Sessions court found that appellant's comment
was defamatory — Sessions court rejected defence of justification — Whether
D appellant's comment was defamatory of respondent — Whether appellant's
comment imputed any dishonesty on part of respondent or had the capability of
lowering the estimation of her in the eyes of a reasonable reader — Whether
comment was true — Whether respondent had in fact retracted her position at trial
E — Whether defence of justification proven — Whether sessions court misdirected
in evaluation of evidence which warranted appellate intervention*

The respondent was one of the witnesses in a defamation suit in the Johor
Bahru High Court between Masyitah bt Md Hassan and Dr Sakinah bt Sulong
F ('the JB Suit'). In the present case, the respondent had filed an action against
the appellant in the sessions court for defamation in relation to the appellant's
comment on her Facebook page on 26 October 2020 as followed: 'Rajdave
Singh the medical records revealed the interview of the mum and what she said
actually happened to the MO in the hospital and to Dr Sakinah herself during
G the home visit. But in court mum retracted her story and denied everything she
told the MO & Dr Sakinah. So the court verdict is not in Dr Sakinah's favour.
We are all devastated. All Dr Sakinah wanted is to protect innocent mums so
that things like this would not happen again' ('the statement'). At the end of the
H case, the sessions court decided that: (a) the statement was not purely about the
different account given to court on what the respondent had previously given
to the medical officer and Dr Sakinah; (b) the statement meant that the
respondent was the cause of Dr Sakinah's loss in the JB Suit — in this regard,
the sessions court relied on one netizen's likewise understanding; and (c) the
I sessions court rejected the defence of justification raised by the appellant.
Aggrieved by the decision, the appellant filed the present appeal. The issue was
whether the statement was defamatory. With respect to defence of justification,
the issue to be determined was whether the respondent had in fact retracted her
position at trial.

Held, allowing the appeal with costs of RM8,000 and setting aside the decision of the sessions court:

- (1) The statement depicted a fact that in court during the trial of the JB Suit, the respondent had retracted her version of what happened which was informed to the medical officer and Dr Sakinah. That statement itself did not convey any defamatory elements. It just conveyed the fact that the respondent had withdrawn from her earlier position. Taking into account the context and circumstances of the statement, the court found that the statement did not impute any dishonesty on the part of the respondent or had the capability of lowering the estimation of her in the eyes of a reasonable reader (see paras 16–17).
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- (2) The sessions court ought to have applied its mind as to whether the statement in its natural and ordinary meaning was defamatory to the respondent. The mere fact that the readers of the statement understood the language in a defamatory sense did not make it defamatory unless they were reasonably justified in so understanding. The respondent's understanding of the statement and the appellant's intention of publishing the same were not relevant to the court's assessment of the statement. The sessions court must examine the statement itself, even if the said statement must be re-read more than once, in a reasonable, objective, and holistic manner. Should the conclusion be that the words in the statement exposed the respondent to hatred, contempt, ridicule or lowered her in the estimation of society at large, then it could be concluded that the statement was defamatory. In the present case, that assessment by the sessions court was absent. The sessions court had not given due weight to the relevant considerations (see paras 20–22).
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- (3) To succeed in the defence of justification, the appellant was not required to prove that every word was the truth but the gist of it was the truth. The appellant had adduced evidence during the trial at the sessions court to justify and show that the respondent had as a matter of fact, retracted her earlier position given prior to the trial of the JB Suit. Thus, it could be concluded that the statement was substantially true. Therefore, the defence of justification must prevail. In any event, the court found that there was also no proper evaluation of the respondent's reputation as a result of the statement. Where there was no proof that the respondent's reputation was materially injured, the defence of justification shall not fail if the words were not proved to be true (see paras 23, 26 & 28–29).
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- (4) The sessions court had erred in the evaluation of the evidence to determine whether the defence of justification was proven. There were failures to accord due weight to the evidence of independent witnesses called by the appellant. The appropriate adverse inference had also not been drawn against the respondent for her failure to adduce any other
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A evidence which was material in nature. The misdirection of the sessions
court in the evaluation of the evidence warranted appellate intervention
(see paras 30–31 & 35–36).

(5) In conclusion, the court found error in the sessions court's reason to
dismiss the defence of justification on the premise that the appellant did
B not contact the respondent to procure the latter's verification. The factual
findings of the JB Suit were also inapplicable to this case because they
were not factual questions for determination in this case. The reasons for
Dr Sakinah's loss were immaterial to whether the statement had defamed
C the respondent. All these showed that the sessions court was
misconceived in coming to its decision. The court found that the
statement was not defamatory in nature given its natural and ordinary
meaning. What was apparent based on the evidence was that the
appellant had duly proven its defence of justification (see paras 37–38).

D **[Bahasa Malaysia summary]**

Responden merupakan salah seorang saksi dalam kes saman fitnah di
Mahkamah Tinggi Johor Bahru antara Masyitah bt Md Hassan dan Dr
Sakinah bt Sulong ('Saman JB'). Dalam kes semasa, responden telah
E memfailkan tindakan terhadap perayu di mahkamah sesyen kerana memfitnah
berhubung komen perayu di laman Facebooknya pada 26 Oktober 2020
seperti berikut: 'Rajdave Singh the medical records revealed the interview of
the mum and what she said actually happened to the MO in the hospital and
to Dr Sakinah herself during the home visit. But in court mum retracted her
F story and denied everything she told the MO & Dr Sakinah. So the court
verdict is not in Dr Sakinah's favour. We are all devastated. All Dr Sakinah
wanted is to protect innocent mums so that things like this would not happen
again' ('kenyataan tersebut'). Pada akhir kes, mahkamah sesyen memutuskan
bahawa: (a) kenyataan tersebut bukan semata-mata mengenai pendirian
berbeza yang diberikan kepada mahkamah mengenai perkara yang sebelum ini
G diberikan oleh responden kepada pegawai perubatan dan Dr Sakinah;
(b) kenyataan tersebut bermakna bahawa responden adalah punca kekalahan
Dr Sakinah dalam Saman JB tersebut — dalam hal ini, mahkamah sesyen
bergantung kepada pemahaman yang sama oleh seorang netizen; dan
H (c) mahkamah sesyen menolak pembelaan justifikasi yang dibangkitkan oleh
perayu. Terkilan dengan keputusan tersebut, perayu memfailkan rayuan
semasa. Isunya ialah sama ada kenyataan tersebut berunsur fitnah. Berkenaan
dengan pembelaan justifikasi, isu yang perlu ditentukan ialah sama ada
responden sememangnya telah menarik balik pendiriannya semasa
I perbincangan.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM8,000 dan
mengeneipkan keputusan mahkamah sesyen:

(1) Kenyataan tersebut menggambarkan fakta bahawa semasa perbincangan

- Saman JB di mahkamah, responden telah menarik balik versinya tentang apa yang berlaku yang dimaklumkan kepada pegawai perubatan dan Dr Sakinah. Kenyataan itu sendiri tidak membawa apa-apa unsur fitnah. Ia hanya menyampaikan fakta bahawa responden telah menarik balik pendiriannya sebelum ini. Dengan mengambil kira konteks dan keadaan kenyataan tersebut, mahkamah mendapati bahawa kenyataan tersebut tidak mengaitkan apa-apa ketidakjujuran di pihak responden atau mempunyai keupayaan untuk merendahkan reputasinya di mata pembaca yang munasabah (lihat perenggan 16–17).
- (2) Mahkamah sesyen sepatutnya mengaplikasikan fikirannya kepada isu sama ada kenyataan tersebut dalam maksud semula jadi dan biasanya memfitnah responden. Fakta bahawa pembaca kenyataan tersebut memahami bahasanya dalam erti kata fitnah semata-mata tidak menjadikannya sebagai fitnah melainkan mereka mempunyai asas yang munasabah dalam memahaminya sedemikian. Pemahaman responden terhadap kenyataan tersebut dan niat perayu untuk menerbitkan perkara yang sama adalah tidak relevan kepada penilaian mahkamah terhadap kenyataan tersebut. Mahkamah sesyen mesti meneliti kenyataan itu sendiri, walaupun kenyataan tersebut mesti dibaca semula lebih daripada sekali, dengan cara yang munasabah, objektif dan holistik. Sekiranya kesimpulan bahawa perkataan dalam kenyataan tersebut mendedahkan responden kepada kebencian, penghinaan, ejekan atau merendharkannya dalam perkiraan masyarakat secara amnya, maka bolehlah disimpulkan bahawa kenyataan tersebut adalah fitnah. Dalam kes ini, tidak terdapat penilaian sedemikian oleh mahkamah sesyen. Mahkamah sesyen tidak memberikan nilai yang sewajarnya kepada pertimbangan yang berkaitan (lihat perenggan 20–22).
- (3) Untuk berjaya dalam pembelaan justifikasi, perayu tidak perlu membuktikan bahawa setiap perkataan adalah kebenaran tetapi intipatinya adalah kebenaran. Perayu telah mengemukakan keterangan semasa perbicaraan di mahkamah sesyen untuk mewajarkan dan menunjukkan bahawa responden sebenarnya telah menarik balik pendirian terdahulunya yang diberikan sebelum perbicaraan Saman JB. Oleh itu, boleh disimpulkan bahawa kenyataan tersebut adalah benar. Oleh itu, pembelaan justifikasi adalah terpakai. Walau apa pun, mahkamah juga mendapati bahawa tiada penilaian yang sewajarnya terhadap reputasi responden akibat daripada kenyataan tersebut. Jika tiada keterangan bahawa reputasi responden telah dcederakan secara material, pembelaan justifikasi tidak akan gagal jika perkataan tersebut tidak terbukti benar (lihat perenggan 23, 26 & 28–29).
- (4) Mahkamah sesyen telah terkhilaf dalam penilaian keterangan untuk menentukan sama ada pembelaan justifikasi telah dibuktikan. Terdapat kegagalan untuk memberikan nilai yang sewajarnya kepada keterangan

- A saksi bebas yang dipanggil oleh perayu. Inferens bertentangan yang sepatutnya dibuat juga tidak dibuat terhadap responden kerana kegagalannya mengemukakan apa-apa keterangan lain yang bersifat material. Salah arah mahkamah sesyen dalam penilaian keterangan memerlukan campur tangan rayuan (lihat perenggan 30–31 & 35–36).
- B (5) Kesimpulannya, mahkamah menemui kesilapan dalam alasan mahkamah sesyen untuk menolak pembelaan justifikasi atas premis bahawa perayu tidak menghubungi responden untuk mendapatkan pengesahan responden. Dapatan fakta Saman JB juga tidak boleh digunakan untuk kes ini kerana ia bukan soalan fakta untuk penentuan dalam kes ini. Sebab-sebab kekalahan Dr Sakinah adalah tidak penting kepada isu sama ada kenyataan tersebut telah memfitnah responden. Semua ini menunjukkan bahawa mahkamah sesyen telah salah tanggap dalam membuat keputusan. Mahkamah mendapati kenyataan tersebut tidak bersifat fitnah berdasarkan maksudnya yang semula jadi dan biasa. Apa yang nyata berdasarkan keterangan ialah perayu telah membuktikan dengan sewajarnya pembelaan justifikasinya (lihat perenggan 37–38).]

Cases referred to

- E *Abdul Rahman Talib v Seenivasagam & Anor* [1966] 2 MLJ 66, FC (refd)
Allied Physics Sdn Bhd v Ketua Audit Negara (Malaysia) & Anor and other appeals [2016] 5 MLJ 113, CA (refd)
Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371, CA (refd)
- F *Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor* [2014] 4 MLJ 242, CA (refd)
Dato' Sri Dr Mohamad Salleh bin Ismail & Anor v Nurul Izzah bt Anwar & Anor [2021] 2 MLJ 577, FC (refd)
Director of Forests & Anor v Mau Kam Tong & Mau Kim Siong (the executors of the estate of Mau Ming, deceased) & Anor and another appeal [2010] 3 MLJ 509, CA (refd)
- G *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1, FC (refd)
Genisys Intergrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors [2008] 6 MLJ 237, CA (refd)
- H *Lim Kit Siang v Datuk Dr Ling Liong Sik & Ors* [1997] 5 MLJ 523, HC (refd)
Mohamed Hafiz Mohamed Nordin v Eric Paulsen and another appeal [2019] 1 MLJ 580, CA (refd)
Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67, FC (refd)
- I *Raub Australian Gold Mining Sdn Bhd (in creditors' voluntary liquidation) v Hue Shieh Lee* [2019] 3 MLJ 720, FC (refd)
Syarikat Bekalan Air Selangor Sdn Bhd v Tony Pua Kiam Wee [2015] 6 MLJ 187, FC (refd)

Tun Datuk Patinggi Haji Abdul-Rahman Ya' Kub v Bre Sdn Bhd & Ors [1996] 1 MLJ 393, HC (refd) A

Ummi Hafilda bte Ali & Anor v Karangkras Sdn Bhd & Ors (No 2) [2000] 6 MLJ 532, HC (refd)

Utusan Melayu (M) Bhd v Othman bin Hj Omar [2017] 2 MLJ 800, CA (refd) B
Wong Kar Juat & Anor v S7 Auto Parts (M) Sdn Bhd [2016] 5 MLJ 527, CA (refd)

Legislation referred to

Defamation Act 1957 s 8 C

Raja Eileen Suraya (with Michelle Khor Chiew Hong) (Raja, Darryl & Loh) for the appellant.

Nur Izzaida Zamani (with Nur Aqilah Azaldin) (CK Ling Izzaida & Ima) for the respondent. D

Roz Mawar Rozain JC:

THE SESSIONS COURT'S DECISION

[1] After a full trial the sessions court had on 15 June 2022, entered the following judgment: E

- (a) declared that the appellant comment on her Facebook page on 26 October 2020 amounted to a defamatory statement against the respondent; F
- (b) an injunction prohibiting the appellant (whether by herself or her agents) from further posting, publishing or causing thereof any statements written or verbal any other defamatory statements against the respondent which are untrue implicating the respondent with the giving of false testimony and/or changing and/or retracting her testimony in the court proceedings of the High Court in Johor Bahru Civil Suit No JA-22NCVC-162-08 of 2018 ('JB suit'); G
- (c) the appellant published an unconditional apology (with terms approved of by the respondent) which includes a statement that the defamatory statement made was done with malice on the part of the appellant, and that such apology remains on the appellant social media for thirty days; H
- (d) general damages in the sum of RM50,000 to be paid by the appellant to the respondent; I
- (e) interest of 5% on the sum of the general damages awarded; and
- (f) costs of RM18,000 to be paid by the appellant to the respondent.

- A [2] That Facebook comment the sessions court declared to have defamed and slandered the respondent pertained to a decision delivered by the Johor Bahru High Court in the JB suit. As a bit of background, that JB suit was also a defamation suit. It was between one Masyitah bt Md Hassan and Dr Sakinah bt Sulong. The respondent had testified as a witness for Masyitah. The Facebook comment published on the appellant page read:
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C Rajdave Singh the medical records revealed the interview of the mum and what she said actually happened to the MO in the hospital and to Dr Sakinah herself during the home visit. But in court mum retracted her story and denied everything she told the MO & Dr Sakinah. So the court verdict is not in Dr Sakinah's favour. We are all devastated. All Dr Sakinah wanted is to protect innocent mums so that things like this would not happen again.

- D [3] The sessions court did not find that the said statement was purely about the different account given to court on what the respondent had previously given to the medical officer and Dr Sakinah. It found that the statement meant that the respondent was the cause of Dr Sakinah's loss in the JB suit. It relied on one netizen's likewise understanding.

- E [4] The defence of justification raised by the appellant was rejected. The sessions court had reviewed the grounds of judgment for the JB suit and found that the reason Dr Sakinah had lost the suit was not due to the respondent's testimony. The sessions court held that the reasons as to why the claim was allowed (and Dr Sakinah had lost) in the JB suit was not within the appellant knowledge thus had dismissed the appellant pleaded defence of justification.
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THIS APPELLANT'S SUBMISSIONS

- G [5] The learned counsel for the appellant submitted that to hold the statement defamatory was not reasonable especially when he had relied on that one posting by a netizen who was of the understanding that Dr Sakinah had lost the JB suit as a consequence of the respondent's testimony. At length, it was submitted that the sessions court had erred when it failed to consider the evidence that was produced at trial that showed the respondent indeed had given a different account in her testimony, not in opposite to what was stated in the appellant said statement. It was contended that merely relying on the JB suite grounds of judgment alone was erroneous.
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- I [6] It was implored by the learned counsel for the appellant that as a matter of law, the sessions court should have given meaning to the said statement that is understood by the ordinary, reasonable, fair-minded reader and not the reading of a man, avid for scandal.

[7] The appellant prayed for appellate intervention as it was submitted that the sessions court had failed to give any judicial appreciation to the evidence that the respondent as a matter of fact, did provide a different account to the healthcare providers compared to what she had testified in the JB suit.

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REPLY BY THE RESPONDENT

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[8] In defending the sessions court judgment, the respondent submitted that the natural and ordinary meaning of the said statement could be understood and perceived as the respondent had given false sworn statement in the JB suit and that she had retracted or changed her statement which was different from the one given at the interview earlier with the medical officer and Dr Sakinah. It was further submitted that it portrayed the respondent as a liar, dishonest person and untrustworthy. The case of *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371 was referred to.

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[9] This court heard submissions from the respondent that the appellant had not proven on a balance of probabilities that the defamatory imputation in the said statement was true. The law under s 8 of the Defamation Act 1957 and the case of *Mohamed Hafiz Mohamed Nordin v Eric Paulsen and another appeal* [2019] 1 MLJ 580 were cited. This court's attention was invited to the decision of the JB suit that found the documents contracted the respondent's testimony whose credibility was upheld by the trial court. It was the respondent's submissions that the evidence that the appellant had sought to rely on (the patient progress note, the home birth case report and Dr Sakinah's notes in the respondent's health record) was found by the Johor Bahru High Court to be unreliable with no credible value.

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[10] It was also the respondent's submissions that the said statement was published with mala fide/malice, the following reasons were cited:

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- (a) the appellant knew that the evidence was not automatically cogent and credible;
- (b) the appellant knew that the evidence was challenged in the JB suit as it did not fully reflect the respondent's full statements precisely and accurately during the interview sessions;
- (c) the appellant had no knowledge on the exact statements as she was not involved in the interview sessions with the respondent and could not confirm or validate the veracity of the respondent's statements;
- (d) the appellant was not involved in the JB suit and had no personal knowledge as to the actual testimony of the respondent;
- (e) Masyitah was not charged for any criminal offence and she had won her case of the JB suit; and

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- A (f) the appellant published the said statement before having had full appraisal as to the grounds of judgment of the JB suit.

[11] The emphasis in the respondent's submissions was on the fact that the respondent was not the reason that Dr Sakinah was unsuccessful to defend the JB suit.

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BACKGROUND FACTS

[12] It serves to assist that the salient background facts are stipulated below before assessing whether there were errors in the sessions court's decision in finding that the appellant was liable for defamation. In February 2018, the nation's attention had turned to the case where the infant had died following a home birth under a supervision of a doula. The mother was the respondent. She was then taken to Hospital Sultan Ismail in Johor Bahru for further examination and treatment.

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[13] Dr Sakinah posted on her social media platform statements in relation to home birth deliveries. Those publications formed the basis of the defamation claim by Masyitah (the doula involved in the said home birth by the respondent) in the JB suit.

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[14] The respondent had testified as a witness for Masyitah in the JB suit. She stated in the trial that Masyitah was not involved in the delivery process of her baby. She had disputed the contents of her medical records.

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[15] The Johor Bahru High Court on 26 October 2020 decided in favour of Masyitah and ordered Dr Sakinah to pay damages for defamation. On the same day, the appellant published the said statement on her Facebook page.

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THIS COURT'S ASSESSMENT

[16] This court's first step is to assess whether the said statement is defamatory. The said statement depicted a fact that in court during the trial of the JB suit, the respondent had retracted her version of what happened which was informed to the medical officer and Dr Sakinah. That statement itself did not convey any defamatory elements. It just conveyed the fact that the respondent had withdrawn from her earlier position. In other words, at the trial of the JB suit, the respondent no longer maintained her earlier stand as to what was contained in the medical records.

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[17] This court finds taking into account the context and circumstances of the said statement, that those words did not impute any dishonesty on her part or had the capability of lowering the estimation of her in the eyes of a

reasonable reader (refer to *Ummi Hafilda bte Ali & Anor v Karangkras Sdn Bhd & Ors (No 2)* [2000] 6 MLJ 532 and *Allied Physics Sdn Bhd v Ketua Audit Negara (Malaysia) & Anor and other appeals* [2016] 5 MLJ 113).

[18] An objective construction of the said statement was necessary; in this court's judicial assessment it does not conclude that the said statement of the change in stance by the respondent at the trial can amount to defamation. Irrespective of what third parties or other netizens understood that said statement meant, it did not conclude that it means that, given its natural and ordinary meaning — see *Raub Australian Gold Mining Sdn Bhd (in creditors' voluntary liquidation) v Hue Shieh Lee* [2019] 3 MLJ 720 and *Lim Kit Siang v Datuk Dr Ling Liong Sik & Ors* [1997] 5 MLJ 523.

[19] This court agrees with the appellant contention that the reaction to the JB suit could not reasonably be attributed to the said statement alone. Given the amount of publicity it attracted via mainstream media coupled with statements issued from the Director-General of Health, the police and even the Pejabat Mufti Wilayah Persekutuan. The appellant was not the only one whose social media page addressed the JB suit, several articles on mainstream media and postings on social media at large reflected the interest it had garnered from the public. As the appellant cannot solely be attributed to third party and netizens' comments on the matter, the sessions court ought not to have placed much reliance on them to determine the natural and ordinary meaning of the said statement. The sessions court ought to have determined it objectively himself. Reference is made to *Raub Australian Gold Mining Sdn Bhd (in creditors' voluntary liquidation) v Hue Shieh Lee* at para 33, p 737:

Whether the words are defamatory lies in the nature of the statement in that it must have the tendency to effect the reputation of a person. Therefore, the question arises in whose eyes the words complained of must have the tendency to affect the plaintiff's reputation. In the *Law of Defamation in Singapore and Malaysia* (2nd Ed) by Keith R Evans (at p 10), it is stated that, in applying these various tests, the court must look to a particular control group that is, whose eyes must the estimation of the plaintiff be lowered before the words are said to be defamatory. In determining the issue, the court does not look at the actual effect of the allegations on the person's reputation, or the meaning of the words actually understood or taken by the listeners (see: *JB Jeyaretnam v Goh Chok Tong* [1985] 1 MLJ 334). It is not enough that the listeners actually take the words in a defamatory sense, for they must be reasonably justified in so understanding the words before they are found to be defamatory (see: *Straits Times Press (1975) Ltd, The v Workers' Party & Anor* [1987] 1 MLJ 186).

[20] In other words, the mere fact that the readers of the said statement understood the language in a defamatory sense does not make it defamatory unless they were reasonably justified in so understanding. The sessions court must examine the said statement itself, even if the said statement must be

A re-read more than once, in a reasonable, objective, and holistic manner. Should the conclusion be that the words in the said statement exposed the respondent to hatred, contempt, ridicule or lowered her in the estimation of society at large, then it can be concluded that the said statement was defamatory. Here, that assessment by the sessions court was absent.

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C [21] This court is inclined to agree with the submissions by the appellant that the sessions court's grounds of judgment at para 52 showed that there may have been misunderstanding that the said statement was alleged to be defamatory to the respondent and not to the trial judge in the JB suit. The sessions court had found that the appellant in publishing the said statement was premature and prejudicial as it was done in an impatient manner without the benefit of reading the actual reasons of the trial judge in allowing Masyitah's claim in the JB suit. This court finds that it was erroneous on the part of the sessions court when it ought to have applied its mind as to whether the said statement in its natural and ordinary meaning was defamatory to the respondent.

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E [22] In concluding that the said statement upon reading was not defamatory, this court looked at it objectively and not subjectively — which mean that the respondent's understanding of them and the appellant intention of publishing the same were not relevant to this court's assessment of the said statement. This court found on this count that the sessions court had not given due weight to the relevant considerations. Refer to *Utusan Melayu (M) Bhd v Othman bin Hj Omar* [2017] 2 MLJ 800, *Tun Datuk Patinggi Haji Abdul-Rahman Ya' Kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393 and *Director of Forests & Anor v Mau Kam Tong & Mau Kim Siong (the executors of the estate of Mau Ming, deceased) & Anor and another appeal* [2010] 3 MLJ 509.

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H [23] On the appellant defence of justification, the sessions court held that it would only succeed if all material statements in the publication were proven to be true at para 45 of the grounds of judgment. The Federal Court in *Dato' Sri Dr Mohamad Salleh bin Ismail & Anor v Nurul Izzah bt Anwar & Anor* [2021] 2 MLJ 577 had held otherwise. To succeed in the defence of justification, the appellant need not prove that every word is the truth but the gist of it or the sting of the main charge is. Reference is also made to the Court of Appeal's decision in *Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor* [2014] 4 MLJ 242.

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[24] This court also turned to s 8 of the Defamation Act 1957 wherein the defence of justification is provided for:

In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fall by reason only

- that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges. A
- [25] Therefore, it ought to be evaluated whether the respondent had in fact retracted her position at trial which was what the said statement iterated. It was not correct for the sessions court to instead looked into the correctness of the decision of the JB suit together with the cause of Dr Sakinah's loss (paras 50, 51 and 59 of the sessions court's grounds of judgment). It was erroneous to have held that the retraction by the respondent as irrelevant because it was not determined in the JB suit (para 65 of the sessions court's grounds of judgment). B C
- [26] This court observed that there was also no proper evaluation of the respondent's reputation as a result of the said statement. Where there was no proof that the respondent's reputation was materially injured, the defence of justification shall not fail if the words were not proved to be true — see the Federal Court's decision in *Abdul Rahman Talib v Seenivasagam & Anor* [1966] 2 MLJ 66. D
- [27] The appellant had made clear in the particulars of justification the case she sought to set up and justify (refer to the Federal Court's decision in *Syarikat Bekalan Air Selangor Sdn Bhd v Tony Pua Kiam Wee* [2015] 6 MLJ 187). Thus, this court considered the appellant pleaded defence that the said statement, in its natural and ordinary meaning meant that: E
- (a) the respondent's evidence in the JB suit contradicted the medical records and reports; F
 - (b) the respondent denied the prior discussions with the medical officers and Dr Sakinah; G
 - (c) she had retracted her prior position; and
 - (d) her evidence was different to the account she had earlier provided to the medical officers and Dr Sakinah.
- [28] The appellant had adduced evidence during the trial at the sessions court to justify and show that the respondent had as a matter of fact, retracted her earlier position given prior to the trial of the JB suit. The appeal records contained the interviews with the respondent on separate occasions. It was recorded the account of that fateful day given by the respondent. All the records though recorded on different days were consistent as with all the witnesses called by the appellant — one of the main material facts was that Masyitah was present and involved in the home birth. That narrative was repeated three times to different medical officers on different dates at different locations. This fact was denied when the respondent admittedly retracted her position when she H I

A testified in the JB suit. It was her evidence in the JB suit that Masyitah was there to merely provide support and encouragement and that it was her husband who had delivered the baby.

B [29] Inevitably it must be concluded that the said statement was substantially true — in that she had denied everything she had told the medical officers and Dr Sakinah. The defence of justification must prevail.

C [30] The sessions court had failed to accord due consideration to the evidence of the healthcare providers. The grounds of judgment was silent as to the evaluation of the appellant evidence that comprised of independent, contemporaneous evidence. The respondent on the other hand did not offer any corroborative evidence to support her version of event.

D [31] When the sessions court declined to draw adverse inference against the respondent who had failed to adduce any other evidence, it committed an error. That evidence was material in nature as it could help to find whether the respondent had not given the accounts as per the records of the medical officers. Thus, it can be safely concluded that if produced the evidence would be unfavourable to the respondent — see *Wong Kar Juat & Anor v S7 Auto Parts (M) Sdn Bhd* [2016] 5 MLJ 527.

F [32] The respondent argued that the medical records, reports and notes did not contain verbatim statements taken from her. She contended that they were the medical officers' interpretation and summary of what they had understood. Be that as it may, it still did not change the fact that it was retracted and denied by the respondent during her testimony in the JB suit. This was confirmed by the respondent herself during the trial at the sessions court.

G [33] It was the further submissions of the appellant that the respondent may have had an ulterior motive to change or rather retract her position when she testified in the JB suit. That, according to the appellant submissions was the suggestion put to the respondent that the death of her infant at the home birth was potentially a criminal matter that was being investigated by the authorities.

H The respondent admitted to knowing the repercussions to a person not qualified in medical practice or a doula to be involved in delivery of a baby. Regarding this issue, this court finds that it did not factually disturb that the fact that the said statement by the appellant was in gist, true.

I APPELLATE INTERVENTION

[34] As there were instances as above of lack of judicial appreciation of the evidence, this court's appellate intervention is warranted. Refer to *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 and *Ng*

Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67.

A

[35] The sessions court had erred in the evaluation of the evidence to determine whether the defence of justification was proven. There were failures to accord due weight to the evidence of independent witnesses called by the appellant. The appropriate adverse inference had also not been drawn against the respondent.

B

[36] The misdirection of the sessions court in the evaluation of the evidence warranted appellate intervention — see the Court of Appeal’s decision in *Genisys Intergrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors* [2008] 6 MLJ 237.

C

[37] This court found error in the sessions court’s reason to dismiss the defence of justification on the premise that the appellant did not contact the respondent to procure the latter’s verification (para 55 of the grounds of judgment). The factual findings of the JB suit were also inapplicable to this case because they were not factual questions for determination in this case. The reasons for Dr Sakinah’s loss were immaterial to whether the said statement had defamed the respondent. All these showed that the sessions court was misconceived in coming to its decision.

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[38] So, in this instance, this court will exercise its appellate powers and set aside the sessions court’s decision. This court finds that the said statement was not defamatory in nature given its natural and ordinary meaning. What is apparent based on the evidence, the appellant had duly proven its defence of justification.

F

THIS COURT’S ORDER

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[39] This appeal is allowed. The decision of the sessions court is set aside. On this premise, this court will not address the appeal as to the general damages granted by the sessions court. The respondent is ordered to return the RM50,000 paid by the appellant as damages within fourteen days. The respondent is also ordered to return RM12,800 that was paid to her pertaining to the costs awarded to her by the sessions court within the same time frame.

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[40] Costs of this appeal is awarded to the appellant. This court allows the counsel for the respondent’s plea that it is in the sum of RM8,000.

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A *Appeal allowed with costs of RM8,000 and decision of sessions court set aside.*

Reported by Dzulkarnain Ab Fatar

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